LIBRARY
SUPREME COURT, U. S.

Supreme Court, U. S.
FILED
SEP 18 1973

IN THE

Supreme Court of the United States

October Term, 1973

No. 73-235

MARCO DEFUNIS, *et al.*,
Appellants-Petitioners,

v.

CHARLES ODEGAARD, *President of the University of Washington, et al.,*
Appellees-Respondents.

ON APPEAL FROM THE SUPREME COURT
OF THE STATE OF WASHINGTON

MOTION OF DISMISSAL OF APPEAL OR, IN THE ALTERNATIVE, AFFIRMANCE OF THE JUDGMENT BELOW AND STATEMENT IN OPPOSITION TO CERTIORARI

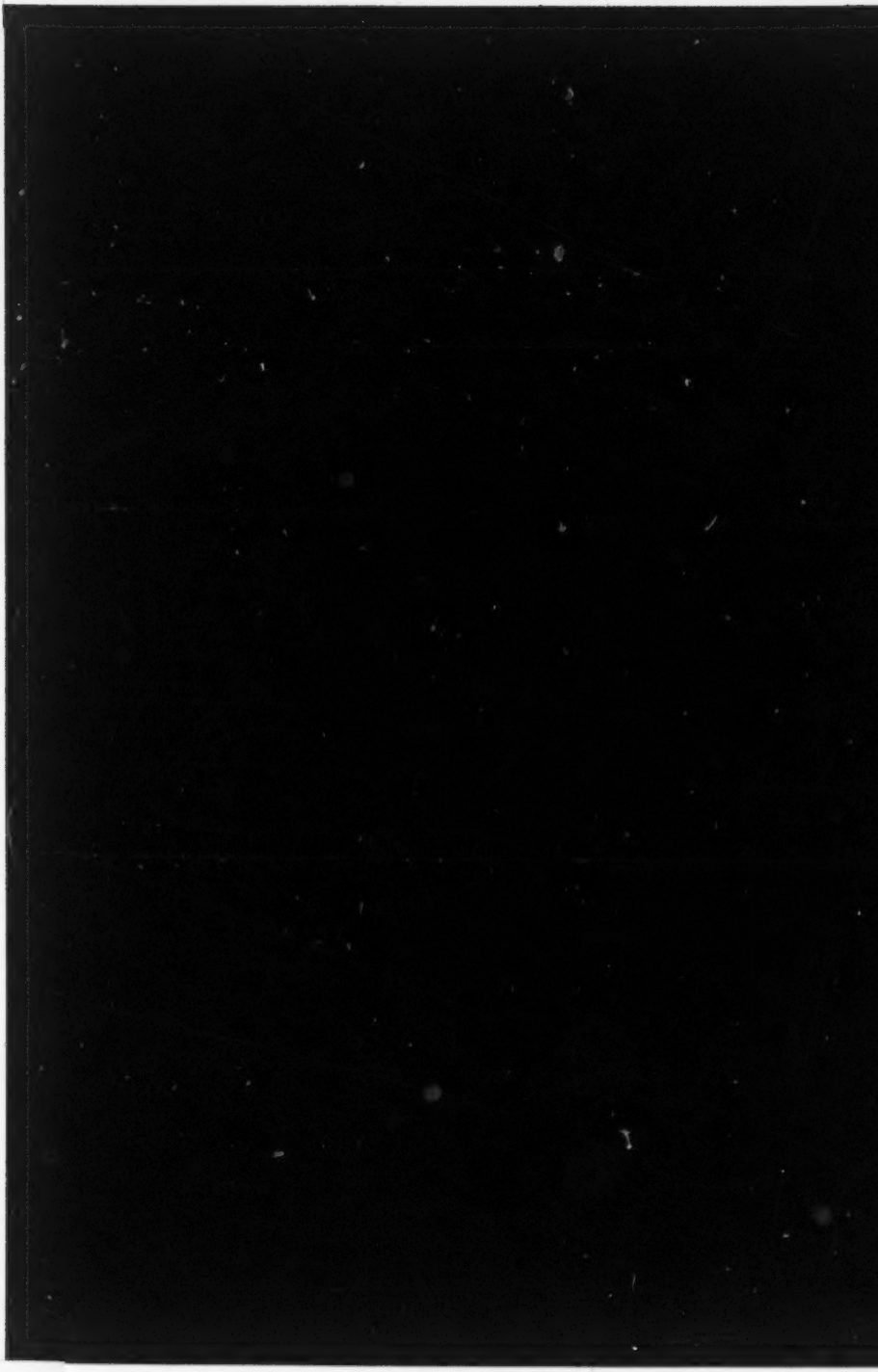
SLADE GORTON
Attorney General
State of Washington

By: James B. Wilson
Senior Assistant
Attorney General
Chief, University of
Washington Division
Attorneys for
Appellees-Respondents
112 Administration Building
University of Washington
Seattle, Washington 98195
Tel: 206–543–4150

Of Counsel:
William R. Andersen
Professor of Law
Charles E. Corker
Professor of Law
University of Washington
Law School
Seattle, Washington 98195

September 12, 1973

UNIVERSITY OF WASHINGTON, DEPARTMENT OF PRINTING



INDEX

	Page
Motion to Dismiss or Affirm	1
Jurisdiction	2
Statutes	2
Question Presented	3
Statement	3
ARGUMENT	
I. The Appeal is not within the Jurisdiction of the Court because no State Statute within the Meaning of 28 U.S.C., §1257(2) Exists	7
II. The Judgment Appealed from Rests on an Adequate Non-Federal Basis	8
III. The Judgment of the Supreme Court of Washington Presents no Substantial Federal Question	11
Conclusion	19

TABLE OF AUTHORITIES

Cases:	Page
Adams v. U.S. ex rel. McCann, 317 U.S. 269, 281, 63 S. Ct. 236, 242, 87 L. Ed. 268 (1942)	9
Beck v. Washington, 369 U.S. 541, 82 S. Ct. 955 (1965)	2, 9
Brown v. Board of Education, 347 U.S. 483 (1954)	12
Carter v. Gallagher, 452 F.2d 315 (8th Cir. 1971), *cert. denied*, 406 U.S. 950 (1972)	15
DeFunis v. Odegaard, 82 Wn.2d 11, 507 P.2d 1169 (1973)	7, 16, 17
Green v. County School Board, 391 U.S. 430, 20 L. Ed. 2d 716, 88 S. Ct. 1689 (1968)	14

Page

Griggs v. Duke Power Co., 401 U.S. 427, 91 S. Ct. 849 (1971) 15

Hamilton v. Regents of the University of California, 293 U.S. 245, 55 S. Ct. 197 (1934) 8

North Carolina State Board of Education v. Swann, 402 U.S. 43, 45, 28 L. Ed. 2d 586, 91 S. Ct. 1284 (1971) . . 14

Peters v. Kiff, 407 U.S. 493 (1972) 10, 11

Porcelli v. Titus, 431 F.2d 1254 (3d Cir. 1970), *cert. denied*, 402 U.S. 944, 29 L. Ed. 2d 112, 91 S. Ct. 1612 (1971) 14

State v. Bogner, 62 Wn.2d 247, 258, 382 P.2d 254 (1963) 9

Swann v. Charlotte-Mecklenburg Board of Education, 402 U.S. 1, 28 L. Ed. 2d 554, 91 S. Ct. 1267 (1971) . 11, 14, 18

Sweatt v. Painter, 339 U.S. 629, 94 L. Ed. 1114, 70 S. Ct. 848 (1950) 12, 17

Trafficante v. Metropolitan Life Ins. Co., 409 U.S. 205 (1972) 10, 11

Unemployment Compensation Dept. v. Hunt, 17 Wn.2d 228, 241, 135 P.2d 89 (1943) 2

United States v. Handy, 351 U.S. 454, 462, 76 S. Ct. 965 (1956) 9

United States v. Jefferson County Board of Education, 372 F.2d 836 (5th Cir. 1966) *aff'd en banc.*, 380 F.2d 385 (1967), *cert. denied*, 389 U.S. 840, 19 L. Ed. 2d 104, 88 S. Ct. 77 (1967) 14

Wash. Osteopathic Medical Assn. v. King County Medical Service, 78 Wn.2d 577, 478 P.2d 228 (1970) 2

Constitutional Provisions:

United States Constitution

Thirteenth Amendment 12

Fourteenth Amendment 2, 12, 15, 17

Fifteenth Amendment 12

Page

Statutes:

28 U.S.C. 1257(2) 2, 7

28 U.S.C. 1257(3) 2

28 U.S.C. 2103 2

42 U.S.C 2000(d) 2

Title VII of the Civil Rights Act of 1964 15

R.C.W. 28B.10.528 3

R.C.W. 28B.20 3

R.C.W. 28B.20.030 3

R.C.W. 28B.20.100 3

R.C.W. 28B.20.200 4

Other Authorities:

Congressional Record, September 2, 1970, page 30786 . . 16

Freund, Sutherland, Howe, Brown, *Constitutional Law, Cases and Other Problems*, 1140 (1967) 13, 18

Gellhorn, *The Law Schools and the Negro*, 1968 Duke L.J. 1069, 1073 16

IN THE

Supreme Court of the United States

October Term, 1973

No. 73-235

MARCO DEFUNIS, *et al.*,
Appellants-Petitioners,

v.

CHARLES ODEGAARD, *President of the University of Washington, et al.,*
Appellees-Respondents.

ON APPEAL FROM THE SUPREME COURT
OF THE STATE OF WASHINGTON

MOTION OF DISMISSAL OF APPEAL OR, IN THE ALTERNATIVE, AFFIRMANCE OF THE JUDGMENT BELOW AND STATEMENT IN OPPOSITION TO CERTIORARI

MOTION TO DISMISS OR AFFIRM

Appellee-respondents move the Court to dismiss this appeal or, in the alternative, to affirm the judgment of the Supreme Court of the State of Washington on the grounds that the appeal is not within the jurisdiction of this Court, the judgment rests on adequate non-federal grounds, and it is manifest that the questions on which the decision of the cause depends are so unsubstantial as not to need further argument. Appellants' jurisdictional statement alternatively petitions for certiorari. This motion to dismiss or affirm should also be considered as a brief in opposition to the petition for certiorari.

JURISDICTION

Appellant-petitioners assert jurisdiction under 28 U.S.C. 1257(2) and, alternatively, under 28 U.S.C. 1257(3) pursuant to 28 U.S.C. 2103.

They challenged the admissions policy of the board of regents of the University of Washington, an agency of the State of Washington, as it was implemented by the law school of the University of Washington, in the King County Superior Court after appellant-petitioner Marco DeFunis, Jr., had been denied admission to the law school class commencing September, 1971. This challenge was based in part on the federal constitutional ground that application of the admissions policy as it affected the appellant Marco DeFunis, Jr., denied him the equal protection of the laws guaranteed by Section 1 of the Fourteenth Amendment to the United States Constitution.*

STATUTES

Neither appellants-petitioners nor *amicus curiae* identify any statute, or anything resembling a statute, the constitutionality of which is challenged. An informal statement describing the minority admissions policy is neither regulation nor statute.

---

* Appellants now claim the application of that policy also violated Section 2000(d), Title 42, United States Code. That issue was first raised in their brief as respondents before the Supreme Court of the State of Washington, and such claim was not ruled upon by that court. In *Unemployment Compensation Dept. v. Hunt*, 17 Wn.2d 228, 241, 135 P.2d 89 (1943), that court held as follows:

> "... questions which are not raised in any manner before the trial court will not be considered on appeal."

The principle has been adhered to as recently as December, 1970, in *Wash. Osteopathic Medical Assn. v. King County Medical Service*, 78 Wn.2d 577, 478 P.2d 228 (1970).

See also *Beck v. Washington*, 369 U.S. 541, 82 S. Ct. 955 (1965), where this Court refused to consider federal constitutional questions not raised by the appellant in the *trial court* in the State of Washington, stating:

> "The Washington Supreme Court has unfailingly refused to consider constitutional attacks upon statutes not made in the trial court ..."

QUESTION PRESENTED

If this Court accepts jurisdiction, it should be limited to the question: May the law school of the University of Washington, a state university, constitutionally take into account, as one element in selecting from among qualified applicants for the study of law, the races of applicants in pursuit of a state policy to mitigate gross under-representation of certain minorities in the law school and in the membership of the bar?

STATEMENT

The University of Washington is one of two universities within the State of Washington operated by the state. (Revised Code of Washington (RCW) Ch. 28B.20.) It was established by the Territory of Washington in 1861 and is located in the City of Seattle in a metropolitan area with a population of over 1,000,000 people. There are approximately 34,000 students currently enrolled at the university. It has the only state-operated law school. Current enrollment at the law school is 445 students.

The government of the university is vested in a board of regents of seven members who are appointed for terms of six years by the governor subject to the confirmation of the state senate (RCW 28B.20.100). The board has the "full control of the university and its property of various kinds . . ." and employs the president and faculty. It also is authorized to establish entrance requirements for students seeking admission to the university (RCW 28B.20.030). The board may delegate to the president of the university or his designee any of the powers or duties vested in it (RCW 28B.10.528). The faculty of the university has responsibility for the "immediate government"

of the university under such rules and regulations as the board of regents may prescribe (RCW 28B.20.200).

Marco DeFunis, Jr., was one of 1601 applicants for 150 places available for first-year students who were to begin the study of law at the University of Washington in September, 1971. Like Mr. DeFunis, most of the applicants were qualified both by the "mechanical" or mathematical quantifiable standards available to the law school, and by the more subjective factors used to predict success in law study. (St.* 33, 219, 334, 336.)

The "mechanical" standards are similar to those used generally by law schools throughout the United States, and consist of a combination of undergraduate pre-law school grade point averages (GPA's) and scores from the nationally-administered Law School Admissions Test (LSAT). In combination, these two factors provide a "predicted first-year average" (PFYA). In addition to these numbers, the law school exercises judgment in its admissions decisions by taking into account such things as the quality and consistency of academic records, evidence from letters of recommendation and the applicant's statement, and the applicant's record of achievements (Ex. 45, St. 479).

The law school's admissions process was explored at great length in the trial court. The trial court found no deficiency in respect to any of the foregoing aspects of the process. The only defect in the process asserted by the trial court was that by which members of under-represented minority races in the law school and at the bar in Washington were admitted to the law school despite somewhat lower predicted first-year averages in some (but not all) cases.

* "St." refers to the Statement of Facts, that portion of the record before this Court containing the transcript of the proceedings before the King County Superior Court.

All students who were admitted to the law school, whether or not a member of a minority race, were determined to be qualified to study law. No "quota" in the sense of a fixed number of admittees in any category, or in the sense of a ratio or percentage, was ever established (St. 420). No student was ever excluded from the law school because of his race, except in the sense that if minority students had not been admitted there may have been more of the 150 first-year places available to non-minority students. Until the university initiated an affirmative action program there were rarely if ever more than one or two black law students enrolled in the law school at any one time.

Applicants to the law school must have earned an undergraduate degree and taken the Law School Admission Test (St. 38, 39). They must also submit with their applications a copy of transcripts from all schools and colleges which they have attended, together with statements from appropriate officials at the applicants' undergraduate institutions, letters of recommendation, and such other statements as they may wish to submit in support of their application (St. 339, Ex. 43).

The law school faculty, pursuant to the authority delegated to it by the board of regents and the president of the university, had established an Admissions and Re-admissions Committee composed of five faculty members and two students which actually made the admissions decisions (St. 330).

The Law School Admissions and Re-admissions Committee, in considering the applicants and determining who would and who would not be invited to attend the law school, separated from the applicant files those files whose applicants had identified themselves as members of minority races, i.e., Black, Chi-

cano, American-Indian, and Filipino-American.* The minority applicants' files were considered by a sub-group of the admissions committee deemed particularly competent to ascertain who among them had the highest probability of succeeding in law school and should be recommended to the entire committee for admission (St. 351–353). This procedure was part of the affirmative action policy of the university of seeking greater representation of students from those racial minorities who have suffered from the effects of past racial discrimination (St. 233). As a consequence of its policy, the law school included within the admitted group of applicants some members of racial minorities whose "mechanical" credentials were lower than some of those of the non-minority applicants but whose entire record showed the committee that they were capable of successfully completing the law school program and of making material contributions to the class, the law school, and subsequently to the profession of law.

Appellant-petitioner DeFunis was not among those admitted to the law school class although he had higher "mechanical" credentials than some of the minority applicants who were enrolled.

Mr. DeFunis is presently commencing his final year in the law school by reason of the order initially entered in this matter by the Honorable Lloyd Shorett, Judge of the Superior Court of the State of Washington for King County, which order, though reversed by the Supreme Court of the State of Washington, is still in effect due to the stay entered herein by

---

* Other Asian-American applicants were not under-represented in the profession or in the law school and there was, therefore, no reason to extend a special admissions policy to them (St. 352).

Mr. Justice Douglas.*

ARGUMENT

I. *The Appeal is not within the Jurisdiction of the Court because no State Statute within the Meaning of 28 U.S.C. §1257(2) Exists*

The appellate jurisdiction of this Court depends on an unsuccessful challenge before the Washington Supreme Court of the validity of a Washington State "statute" on the grounds of its being repugnant to the Constitution of the United States. 28 U.S.C. 1257(2).

Appellant-petitioners cite no Washington statute which they challenge but merely claim that the "rule or policy referred to . . . is equivalent to a statute of the state of Washington." (Juris. St. 3.) The policy challenged is the admissions policy of the University of Washington which permits those charged with the admissions decisions to consider the race of the applicants as one factor in a "general attempt to convert formal credentials into realistic predictions" (Ex. 45, St. 479; *DeFunis v. Odegaard*, 82 Wn.2d 11, 507 P.2d 1169 (1973); Juris. St. A-10) and for the purpose of avoiding reliance solely upon "mechanical" credentials which could well result in unfairly denying admission to qualified applicants from minority races. *DeFunis v. Odegaard, supra* (Juris. St. A-11).

---

* Appellant-petitioners' Appendix B (Juris. St. A-58) omits an important portion of Judge Shorett's order which reads as follows:

> "It is ordered, adjudged and decreed that the defendants are directed to allow the plaintiff Marco DeFunis, Jr., admission to the University of Washington School of Law, class of 1974, as of September 22, 1971, and it is further . . ."

Pursuant to that order Mr. DeFunis was admitted and has completed the first two years at the law school while this matter has been pending. Assuming his present rate of progress, he will complete his third year and be awarded his J.D. degree at the end of the 1973/74 academic year regardless of the outcome of this appeal.

This "policy" should not be equated with a "legislative act" such as that considered by this Court in *Hamilton v. Regents of the University of California,* 293 U.S. 245, 55 S. Ct. 197 (1934) where the "rule" of the board of regents requiring all male students enrolled at the University of California to take certain courses in military science was challenged. The real act challenged here is the discretionary one taken on behalf of the board of regents by the law school's Committee for Admissions and Re-admissions of denying appellant-petitioner's admission to the university's law school while, at the same time, admitting others from minority races with lower "mechanical" credentials. Discretionary actions taken by an admissions committee of a state university are not acts "legislative in character" which would give this Court appellate jurisdiction under the rule of *Hamilton v. Regents of the University of California, supra,* and this appeal should, therefore, be dismissed.

II. *The Judgment Appealed from Rests on an Adequate Non-Federal Basis*

While the Washington Supreme Court chose to dispose of the matter before it by resolution of constitutional issues,*

* Thirteen Briefs *Amicus Curiae* were filed in the Washington Supreme Court in support of or opposition to the constitutional issues argued by the appellants in that court. Among the eight *amici* supporting the law school's position were attorneys representing the American Bar Association, the Association of American Law Schools, the Law School Admissions Council, the Council on Legal Education Opportunity, the Seattle–King County Bar Association, the City of Seattle, the American Civil Liberties Union, the American Indian Law Students Association, Inc., the Black American Law Students Association, and the Law Students Civil Rights Research Council. The five *amicus* briefs filed in opposition to the law school's position included one filed on behalf of the Anti-Defamation League of B'nai B'rith, one on behalf of the National Jewish Community Rights Council, Inc., and three by individual attorneys.

appellee-respondents urged that court to reverse without reaching the constitutional issues ruled upon by the trial court.

The claimed injury to Marco DeFunis' constitutional rights is that he failed to be admitted to law school because he was not a member of one of four minority races. If that were the issue, it could not be presented by Mr. DeFunis in this case because the necessary factual foundation is lacking. The trial court found that "some minority students were admitted to the University of Washington school of law prior to and instead of the appellant Marco DeFunis, Jr." (Juris. St. A-66.) We excepted to that finding because the record affirmatively establishes, and without contradiction, that Marco DeFunis would not have been admitted had there been no minority program of admissions to the law school (St. 453–455). Only 36 letters of acceptance were sent to minority applicants (18 of whom actually enrolled), and at least 55 applicants were ranked ahead of DeFunis on the waiting list (St. 379).

Only one who has a personal interest or stake in the adjudication of a constitutional issue has standing to press for its resolution.

As this Court has said on numerous occasions:

> "While this Court stands ready to correct violations of constitutional rights, it also holds that 'it is not asking too much that the burden of showing essential unfairness be sustained by him who claims such injustice and seeks to have the result set aside, and that it be sustained not as a matter of speculation but as a demonstrable reality.'" *United States v. Handy*, 351 U.S. 454, 462, 76 S. Ct. 965 (1956), *Beck v. Washington, supra* footnote p. 2, *Adams v. U.S. ex rel. McCann*, 317 U.S. 269, 281, 63 S. Ct. 236, 242, 87 L. Ed. 268 (1942). See also *State v. Bogner*, 62 Wn.2d 247, 258, 382 P.2d 254 (1963).

Amicus contends that *Peters v. Kiff*, 407 U.S. 493 (1972), and *Trafficante v. Metropolitan Life Ins. Co.*, 409 U.S. 205 (1972), are dispositive of this standing issue. (Amicus Brief in Support of Jurisdictional Statement 15*.) In fact, those two cases uphold standing to litigate quite a different issue from the issue which Mr. DeFunis asserts.

In *Peters v. Kiff*, the standing issue was whether a white defendant might complain of the systematic exclusion of Negroes from the grand jury which indicted and the petit jury which found him guilty. In *Trafficante v. Metropolitan Life Ins. Co.*, the issue was whether two tenants, one white and one non-white, had standing to complain that their lessor discriminated in leasing practices against non-whites. In both cases the Court not only upheld the standing but decided the case on the merits against the racial discrimination. In *Peters*, Mr. Justice Marshall's plurality opinion identified the protected right as a right to a jury from which members of no race had been arbitrarily excluded. In *Trafficante*, the issue was characterized from the beginning as related to a right to live without either economic disadvantage or the stigma attached to residence in a "white ghetto." In both cases, the underlying and ultimate value is that of a pluralistic society, and standing does not depend on the complainant's race.

It is true that both *Peters* and *Trafficante* sustain standing to complain of anti-minority discrimination when the complainant is not a member of the minority. Standing, however, is a concept of relation between a litigant and the issue litigated or the right claimed. To establish standing, it is necessary for DeFunis to accept a formulation of an issue like that in *Peters* and *Trafficante*. Under that formulation, values of a pluralistic society and diversification among races are clearly permissible

* Referred to herein as Am. Br.

in the interests of majority and minority races alike. That issue he loses on the merits, as part III of this Argument will demonstrate.

Only by rejecting *Peters* and *Trafficante* can the issue be posed in terms of a constitutional right violated whenever the law for any purpose takes race into account. On that basis, DeFunis lacks standing because it is clear he would not have been admitted had the admission policy followed the mechanical criteria which he contends that all "color blind" and "race blind" schools are compelled to follow.

The Washington Supreme Court did not decide the factual issue whether DeFunis would have been admitted had there been no minority admissions program. Without a sustainable finding that DeFunis would in some demonstrable way be affected by whether he won or lost the litigation, the case lacks an essential ingredient to a case or controversy cognizable or appropriate for decision by this Court. There is no party with any real interest in the controversy, and a justiciable controversy is not tendered for decision.

III. *The Judgment of the Supreme Court of Washington Presents no Substantial Federal Question*

The unanimous opinion of this Court in *Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 1, 28 L. Ed. 2d 554, 91 S. Ct. 1267 (1971), disposed of the only issue which earlier might have been arguable when it said:

> "School authorities are traditionally charged with broad power to formulate and implement educational policy and might well conclude, for example, that in order to prepare students to live in a pluralistic society each school should have a prescribed ratio of Negro to white students reflecting the proportion for the district as a whole. To do this as an educational policy is within the broad discretionary powers of school authorities; . . ." 402 U.S. at 16.

Amicus concedes that race must be taken into account if this case involved an institution with a history of *de jure* segregation. However, the privilege of educating students of all races and all colors is the privilege of all institutions to educate for a pluralistic society. It is not reserved to those institutions which can establish that they were formerly guilty of racial discrimination. Nor is it for the benefit solely of members of minority races. It is for the benefit of all races, and nowhere is recognition of this value more important than in a law school.

This Court decided *Sweatt v. Painter*, 339 U.S. 629, 94 L. Ed. 1114, 70 S. Ct. 848 (1950), four years before *Brown v. Board of Education*, 347 U.S. 483 (1954). In 1950 it recognized that education of lawyers takes place in important part between student and student, not exclusively between student and professor. In that decision, the Court said:

> "[A]lthough the law is a highly learned profession, we are well aware that it is an intensely practical one. The law school, the proving ground for legal learning and practice, cannot be effective in isolation from the individuals and institutions with which the law interacts. Few students and no one who has practiced law would choose to study in an academic vacuum, removed from the interplay of ideas and the exchange of views with which the law is concerned." *Sweatt v. Painter, supra*, 339 U.S. at p. 634.

A lawyer's education which omitted the Thirteenth, Fourteenth, and Fifteenth Amendments, and the history of attempts to enforce them, would be as incomplete as a course in American history which left out the administration of Abraham Lincoln. A law school in which all black students were systematically excluded would provide an incomplete education for its remaining students. It would make no difference in this respect whether exclusion resulted from laws, from custom, from cultural deprivations, or something even more difficult to identify.

The University of Washington's law school has attempted to take a modest step in achieving legal education for a multiracial and pluralistic society. The Supreme Court of Washington has declared that what the university has done is in furtherance of a compelling state interest in the light of lack of minority representation in the law school and in the legal profession. Other law schools, like other universities, have moved by affirmative action programs to achieve racial integration in education. The manner in which such programs operate may raise many legal issues but there is no such issue in this case. The law school's admissions program was upheld by the trial court, save in one respect. It takes the race of minority applicants into account, and the trial court said it thereby offended the teaching of the first Mr. Justice Harlan's inspired metaphor that the Constitution is color-blind.

Never before, so far as we know, has that metaphor been taken thus literally and out of the context of its appropriate use. Justice Harlan applied the metaphor in dissent from an opinion which upheld racial segregation. He would not have declared legislation in support of the Freedmen's Bureau, of American Indian education, or to rectify any other racial injustice, unconstitutional.

Four distinguished constitutional scholars summarized the authority as of 1967 on this point accurately when they wrote:

> "The highest court of no state and the court of appeals in no federal circuit, however, has yet applied the Harlan ['color-blind constitution'] metaphor to strike down a local effort to reduce racial imbalance in the schools. The far more troublesome questions are related to . . . what affirmative action the constitution may require the school authorities to take to reduce an existing imbalance." Freund, Sutherland, Howe, Brown, *Constitutional Law, Cases and other Problems*, 1140 (1967).

There is no way an affirmative action program to benefit disadvantaged racial minorities can operate without taking race into account. There is no way the decision of the Washington Supreme Court can be reversed on the record before it without constitutional condemnation of all affirmative action programs. That, we believe, is the only issue posed in this case. It has already been resolved by this Court in favor of the result the Washington Supreme Court reached. *Swann v. Charlotte-Mecklenburg Board of Education, supra.*

Furthermore, in *Green v. County School Board*, 391 U.S. 430, 20 L. Ed. 2d 716, 88 S. Ct. 1689 (1968), this Court, in considering a "freedom of choice" plan which did not assign any student on the basis of race, held that the plan was inadequate to eliminate a state-imposed segregated pattern of longstanding and further held that racial awareness of the composition of the school system is probably essential as a "starting point" in seeking to remedy the effects of past discrimination.

In correcting the effects of past discrimination, this Court has stated:

> "Just as the race of students must be considered in determining whether a constitutional violation has occurred, so also must race be considered in formulating a remedy." *North Carolina State Board of Education v. Swann*, 402 U.S. 43, 45, 28 L. Ed. 2d 586, 91 S. Ct. 1284 (1971).

Accord, United States v. Jefferson County Board of Education, 372 F.2d 836 (5th Cir. 1966); *aff'd en banc.*, 380 F.2d 385 (1967), *cert. denied*, 389 U.S. 840, 19 L. Ed. 2d 104, 88 S. Ct. 77 (1967).

On at least two occasions this Court has had the opportunity to review and denied certiorari where a question similar to that raised in this matter has been before the Court. Thus, in *Porcelli v. Titus*, 431 F.2d 1254 (3d Cir. 1970), *cert. denied*, 402

U.S. 944, 29 L. Ed. 2d 112, 91 S. Ct. 1612 (1971), this Court refused to review the Third Circuit decision upholding the school board's judgment to suspend the ordinary promotional system upon racial considerations wherein that court stated:

> "State action based partly on considerations of color, when color is not used per se, and in furtherance of a proper governmental objective, is not necessarily a violation of the Fourteenth Amendment."

This Court has also refused to review an Eighth Circuit Court order which authorized the district court to order the Minneapolis fire department to hire minority applicants notwithstanding its civil service rules, even though in so doing "more qualified non-minority applicants might be bypassed." *Carter v. Gallagher*, 452 F.2d 315 (8th Cir. 1971), *cert. denied*, 406 U.S. 950 (1972).

Finally, this Court has ruled in an analogous case dealing with the application of Title VII of the Civil Rights Act of 1964 that testing or measuring procedures may *not* be given a controlling force where it appears that their use effectively bars from employment racial minorities with a history of invidious discrimination, unless such procedures "are demonstrably a reasonable measure of job performance." *Griggs v. Duke Power Co.*, 401 U.S. 427, 91 S. Ct. 849 (1971).

Yet, appellant-petitioners have asked this Court to require the law school to rely exclusively on such "mechanical" standards in making its admission determinations even though the effect would be to exclude qualified racial minority applicants from law school and, hence, from the legal profession.

Amicus, arguing in support of the appellant-petitioners' jurisdictional statement, suggests that the Washington Supreme Court, in reaching its decision in this matter, tread upon the "very treacherous ground" of finding the questioned classi-

fication non-invidious on some subjective basis, arguing that all such classifications are invidious unless they are justified by a compelling interest—"some over-riding statutory purpose." (Am. Br. 10,11).) While *amicus'* argument is based on this Court's opinions over-ruling criminal statutes in which the test of criminal conduct is the color of a person's skin (hardly the purpose for which the challenged classification occurred in the instant case), the argument is not relevant here since the Washington State Supreme Court specifically found that:

> "... the state has an over-riding interest in promoting integration of public education. In light of the serious under-representation of minority groups in the law schools, and considering that minority groups participate on an equal basis in the tax support of the law school, we find the state interest in eliminating racial imbalance within public legal education to be compelling." *DeFunis v. Odegaard, supra.* (Juris. St. A-24)*

That court further found that:

> "The state also has an overriding interest in providing *all* law students with a legal education that will adequately prepare them to deal with the societal problems which will confront them upon graduation ...
>
> ....
>
> The legal profession plays a critical role in the policy-making sector of our society, whether decisions be public or private, state or local. That lawyers, in making and influencing these decisions, should be cognizant of the views, needs and demands of all segments of society is a principle beyond dispute. The educational interest of the

* The gross under-representation of minority lawyers in the profession nationally (see Ceilhorn, *The Law Schools and the Negro*, 1968 Duke L.J. 1069, 1073) is present in the State of Washington as well. For example, a recent study for the National Bar Association by the Honorable Edward B. Toles, Referee in Bankruptcy in the U.S. District Court (N.D., Ill.) and Chairman of the NBA's Committee on the Judiciary, showed that in the State of Washington there was one white lawyer for every 720 whites in the state, and one black lawyer for every 2436 blacks in the state. (The Toles' report is reprinted in the Congressional Record for September 2, 1970, page 30788.)

> state in producing a racially balanced student body at the law school is compelling." *DeFunis v. Odegaard, supra.* (Juris. St. A-25–26.)

In reaching these conclusions, the court recalled the language of this Court in *Sweatt v. Painter, supra,* quoted above.

Finally, that court found that:

> "[T]he consideration of race in the law school admissions policy meets the test of necessity here because racial imbalance in the law school and the legal profession is the evil to be corrected, and it can only be corrected by providing legal education to those minority groups which have been previously deprived." *DeFunis v. Odegaard, supra,* (Juris. St. A-26.)

That court concluded:

> "[T]hat defendants [appellees-respondents] have shown the necessity of the racial classification herein to the accomplishment of an *over-riding state interest* and have thus sustained the heavy burden imposed upon them under the equal protection provision of the Fourteenth Amendment." *DeFunis v. Odegaard, supra.* (Juris. St. A-27.)

The credentials of the Washington Supreme Court to appraise the compelling nature of the State's interest with respect to legal education and the legal profession are obvious. In Washington, the State Bar Association is an agency of the state. Admission to membership in that association is a prerequisite to practice in the state's courts, and to provide legal advice. The Washington Supreme Court approves rules for admission to practice and for disbarment. It has ultimate responsibility for the enforcement of those rules.

However, even if this Court were to disagree that the state's interest is compelling, this would not permit reversal of the decision. Three other issues would require determination:

1. Is a "compelling state interest" required when, as in this

case, the discrimination is "benign," i.e., discrimination in favor of a disadvantaged minority? In this Court, unlike the Washington Supreme Court, race as a "suspect category" has required a compelling state interest for its justification only when it is discrimination against minorities. The Washington court has upheld the university's admission policy by following what is probably the most difficult route. Benign discrimination might well be permissible in the circumstances of this case whether the state's interest is classified as compelling or not.*

2. In *Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 1, 23 (1971), this Court declined to reach the question whether *de facto* segregation in public schools which results from unconstitutional discrimination in non-educational matters requires public education to employ corrective measures.** Reversal of the Washington Supreme Court's decision would require decision of that issue. While we believe it is true that the University of Washington has never in its history been guilty of invidious discrimination on account of race, it is undeniably true that many kinds of invidious and legally condoned discrimination have contributed to the admission pattern that the university now seeks to correct. Racially restricted covenants, invidious racial discrimination in employment, in public accommodations, even in the right to be buried in a publicly licensed cemetery, are all a part of the state's unfortunate and recent history, within the memory of present students.

---

* See Freund, Sutherland, Howe, Brown, *Constitutional Law, Cases and other Problems, supra.*

** "We do not reach in this case whether the showing that school segregation is a consequence of other types of state action, without any discriminatory action by the school authorities, is a constitutional violation requiring remedial action by a school desegregation decree." 402 U.S. at 23.

3. The nature of the complainants' grievance would require examination. At most, Marco DeFunis can complain that his chance of admission was slightly lessened because of the program of which he complains. Every program designed in any way to aid a disadvantaged minority involves similar costs, whether it is inability of some to attend a neighborhood school or an allocation of resources to remedial programs instead of to programs for those educationally advantaged. Such grievances traditionally have been answered by a rule stated in terms of standing, or by definition of the substantive constitutional right which excludes a right to attend a particular school, or to a particular kind of education that might have been available but for a remedial or minority-oriented program.

Unless this Court is prepared to reject the Washington court's determination that the law school's program is in furtherance of a compelling state interest, and in addition is prepared to reject the university's position with respect to each of the other three issues, the decision below must stand. If the decision below does not stand, every means available to the State of Washington to deal with a critical problem in education, with composition of the legal profession, and with *de facto* segregation in the state's only law school will—unless the Court can point a way as yet undiscovered—have been foreclosed. Beyond the State of Washington and beyond the issues of a pluralistic legal education, a reversal of the decision below will endanger all affirmative action programs throughout the nation and across the entire spectrum of activities in which they are employed.

CONCLUSION

Appellee-respondents respectfully urge this Court to dismiss this appeal for the reason that this Court has no jurisdiction

and this matter may properly be disposed of without reaching the constitutional issues raised, and no substantial federal question is raised. In the alternative, appellee-respondents respectfully urge this Court to affirm the opinion of the Supreme Court of the State of Washington for the reason that the constitutional issues raised herein have already been effectively ruled upon by this Court in other cases. For the reasons given in the motion to dismiss or affirm, appellant-petitioners' alternative petition for writ of certiorari should be denied.

Respectfully submitted,

SLADE GORTON

Attorney General
State of Washington

By: James B. Wilson
Senior Assistant
Attorney General
Chief, University of
Washington Division
Attorneys for
Appellees-Respondents
112 Administration Building
University of Washington
Seattle, Washington 98195
Tel: 206–543–4150

Of Counsel:
William R. Andersen
Professor of Law
Charles E. Corker
Professor of Law
University of Washington
Law School
Seattle, Washington 98195